

IN RE: Gregory M. Parker, Inc. (The Parker
Companies),

Complainant/Petitioner,

v.

South Carolina Electric & Gas
Company,

Defendant/Respondent

**DOMINION ENERGY SOUTH
CAROLINA, INC.'S MOTION FOR
JUDGMENT ON THE PLEADINGS,
TO DISMISS, AND TO HOLD
PROCEEDINGS IN ABEYANCE**

Pursuant to S.C. Code Ann. Regs. 103-829 (2012), Rules 12(b)(6) and 12(c) of the South Carolina Rules of Civil Procedure (“SCRCP”), and other applicable law, Defendant/Respondent Dominion Energy South Carolina, Inc. (“DESC” or “Company”), formerly South Carolina Electric & Gas Company (“SCE&G”),¹ hereby moves for an order of the Public Service Commission of South Carolina (“Commission”) for judgment on the pleadings and to dismiss the complaint filed by Gregory M. Parker, Inc. (The Parker Companies) (“Parker”), which is pending in the above-captioned matter. DESC further moves that the Commission hold the above-captioned matter in abeyance, including testimony filing dates and the hearing date set forth in the Commission’s Prefiled Testimony Letter dated April 9, 2019, and other similar deadlines, until such time as the

¹ South Carolina Electric & Gas Company changed its name to Dominion Energy South Carolina, Inc. on April 29, 2019. *See* letters dated February 20, 2019, and April 12, 2019, in Docket No. 2017-370-E, advising the Public Service Commission of South Carolina of the name change. Although SCE&G was the corporate entity providing electric service to Parker during the periods at issue in the Complaint, for clarity and brevity, the instant Motion uses the terms “DESC” and “Company” to reference both SCE&G and DESC.

Commission may consider and resolve this Motion. In support thereof, DESC would show as follows:

BACKGROUND

A. DESC

DESC owns and operates an integrated electric utility system serving approximately 730,000 residential, commercial, and industrial customers in South Carolina pursuant to rates and charges approved by the Commission in accordance with S.C. Code Ann. § 58-27-10, *et seq.* DESC has established, with Commission approval, a variety of electric rates to meet the needs of its customers, depending upon their individual energy requirements, demands, and usage.

Pertinent to the instant matter, DESC offers three electric service plans that predominantly serve its small and medium-sized business customers—Rate 9, also known as the Company’s “General Service Rate” (“Rate 9”); Rate 20, also known as the Medium General Service Rate (“Rate 20”); and Rate 21, also known as the General Service Time-of-Use Rate (“Rate 21”). *See* Answer at ¶¶6, 8, 12; Answer, Exhibit Nos. 15, 16, and 19.² Although generally available to most small or medium-sized business customers, Rate 9, Rate 20, and Rate 21 differ in the character of the electric service supplied by DESC and the manner in which the corresponding rates and charges are calculated.

Specifically, Rate 9 “is available to customers using the Company’s standard service which is specified as a single point of delivery per premises from an existing overhead distribution system for general light and/or power purposes such as commercial, industrial, religious, charitable and eleemosynary institutions.” Answer, Exhibit No. 15. This rate does not establish a minimum

² Answer, Exhibit Nos. 15, 16, and 19 reflect the currently effective and Commission-approved version of DESC’s Rate Schedules 9, 20, and 21.

demand requirement for service and does not charge the customer for excess demand less than 250 kilovolt-amperes (“kVA”) per month. *Id.* As a result, Rate 9 customers receive from the Company firm service at the point of delivery generally without significant³ limitation on or requirements pertaining to their electric service needs. Importantly, there also is no long-term commitment required to receive service under Rate 9 and customers subsequently can elect to change electric service to another applicable rate schedule without penalty. Therefore, most of the premises owned and occupied by DESC’s small and medium-sized business customers are supplied with electric service pursuant to the rates, terms, and conditions of Rate 9.

By comparison, Rate 20 “is available to any non-residential customer using the Company’s standard service for power and light requirements and having a contract demand of 75 kVA or over.” Answer, Exhibit No. 16. Thus, customers receiving electric service at a metered location under Rate 20 are billed a monthly minimum contract demand of 75 kVA. *Id.* If this minimum level of demand is required by a customer, DESC may have to modify its electric system to meet the customer’s service needs. For this reason, among others, a customer is only eligible for Rate 20 if it enters into a written contract with the Company for a period of at least 5 years during which the customer agrees to pay, at a minimum, the basic facilities charge and the minimum demand charge to enable DESC to recover costs associated with providing a level of service that is more demanding on DESC’s electric system. Because of this 5-year contract period, a customer receiving service under Rate 20 cannot change to a different rate schedule until the 5-year contract term expires. *See* Answer, Exhibit No. 13.

³ Rate 9 establishes customary service limitations such as the character of service (e.g., alternating current, 60 hertz) and informs customers that DESC will furnish service in accordance with its standard specifications. *See* Answer, Exhibit No. 15.

Rate 21 “is available to any customer using the Company’s standard service for power and light requirements and having a contract demand of 50 kVA and a maximum demand of less than 1,000 kVA.” Answer, Exhibit No. 19. The demand and energy charges associated with Rate 21 also vary depending upon the time and season of usage. *Id.* Similar to Rate 20, Customers receiving service under Rate 21 are billed a monthly minimum contract demand of 50 kVA and, if this minimum level of demand is required by a customer, DESC may have to modify its electric system to meet the customer’s service needs. *Id.* For this reason, among others, a customer is only eligible for Rate 21 if it enters into a written contract with the Company for a period of 5 years during which the customer agrees to pay, at a minimum, the basic facilities charge and the minimum demand charge, thereby enabling DESC to recover costs associated with providing a level of service that is more demanding on DESC’s electric system. And like Rate 20, customers electing to receive service under Rate 21 cannot change to a different rate schedule until the 5-year contract term expires. *See* Answer, Exhibit No. 13.

The customer at any time may contact DESC to discuss the rate schedules available to it and, upon request, the Company will confer, advise, and assist the customer with selecting the appropriate rate to a reasonable extent. Due to the 5-year contract term and the minimum demand required under Rate 20 and Rate 21, however, 12 months of a customer’s usage history is preferable in order to assess whether such a rate is appropriate for the account prior to a customer executing a GSA for Rate 20. *See* Answer Exhibit No. 13. For instance, myriad factors such as 1) the materials used in constructing the building, 2) the direction the building is facing, 3) the amount of sunlight entering the building’s windows, the building’s energy efficiency, 4) the type of HVAC equipment installed in the building, 5) the building’s lighting needs, 6) the hours of operation of the facility, 7) the number and type of electrical fixtures and appliances, 8) the average number of

customers per hour, and 9) a host of other variables all affect the nature of service rendered to and required by individual facilities, even though they may be owned by a single individual or entity. Answer, Exhibit No. 20 at pp. 4-5; *see also* Answer, Exhibit No. 13 (Parker selecting Rate 9 for certain new locations because it is “not familiar enough with these sites, and neither have a kitchen”). Nevertheless, if a customer insists on selecting Rate 20 or Rate 21 prior to gathering 12 months of usage history, DESC will accommodate the request provided that the customer’s account meets the availability requirements of the rate.

Whether a customer qualifies for and would benefit from Rate 20 or Rate 21, as compared to Rate 9, therefore depends upon highly individualistic factors such as the character of the customer’s load, the demand the customer places on the Company’s system, and the time of day and season of the customer’s demand and energy usage, which may not be ascertainable for some time after service commences at a particular location. *See* Answer, Exhibit No. 13 (recommending that Parker get “at least a few months of usage and kVA demand data” in order to be able to determine “if the usage history reflects a more beneficial rate for each account”). Similarly, a customer may be willing to enter into a 5-year contract and be obligated to pay the rates under Rate 20 or 21 for one location but not for another. *Id.* For these reasons, and as set forth in the Company’s Commission-approved General Terms and Conditions, DESC does not assume any responsibility make the choice for the customer as to which rate is in the customer’s best interests. *See* Complaint, Exhibit A, Attachment 2 at p.4 (“It is the responsibility of the Customer to select the Rate and the Company will not assume responsibility for the choice.”); Answer, Exhibit Nos. 14 at p. 1 (same), 13 at p. 2.

Regardless of the rate schedule selected by the customer, DESC notifies the customer, every month as part of its monthly service bill, of the applicable rate schedule used in calculating

the customer's monthly service charges as required by S.C. Code Ann. Reg. 103-339(2). *See* Answer, Exhibit No. 12. In addition, and as required by S.C. Code Ann. Regs. 103-330(b), DESC provides "to each new residential and small commercial customer, within 60 days of application for service, a clear and concise explanation of the available rate schedules for the class of service for which the customer makes application for service." Similarly, S.C. Code Ann. Regs. 103-330(c) requires DESC to supply "each residential and small commercial customer to whom more than one rate schedule is reasonably available a clear and concise summary of the existing rate schedules applicable to the customer's class of service at least once a year." The Company has abided by these regulations well before and since December 11, 2008, when Parker first applied for electric service from DESC. Answer at ¶14; Answer, Exhibit Nos. 21, 22. While DESC does not maintain and is not in possession of the specific documents provided to Parker upon initiation of electric service to the eight stores it owns and operates in South Carolina, summaries provided to commercial (non-residential) customers in 2008 and since have been in substantially the same form as the current Summary of Non-Residential Electric Rates. *See* Answer, Exhibit No. 22.

B. Electric Service Supplied to Parker

On or about December 11, 2008, Parker applied to DESC for electric service for its store located 9227 Evan Way, Bluffton, South Carolina ("Store No. 32") with a requested effective date of December 19, 2008. Answer at ¶2; Answer, Exhibit No. 1. The Complaint does not allege that Parker advised the Company of any specific electric service needs for this location. Thus, without any service history and without any specific request for certain service parameters, DESC began supplying electric service to this point of delivery pursuant to the terms, rates, and conditions of Rate 9. *See* Answer, Exhibit No. 2.

Subsequently, Parker opened a second store located at 469 Buckwalter Parkway, Bluffton, South Carolina (“Store No. 33”) and applied for electric service for this location on or about September 1, 2010, with a requested effective date on or about November 2010. Answer at ¶4; Answer, Exhibit No. 5. Again, the Complaint does not allege that Parker advised the Company of any specific electric service needs for this location. Thus, without any service history and without any specific request for certain service parameters, Store No. 33, like Store No. 32, initially received service under Rate 9.

Approximately three weeks after applying for electric service for Store No. 33, on or about September 20, 2010, Parker decided to transfer its electric service for Store No. 32 from Rate 9 to Rate 20. On September 20, 2010, Parker executed a written General Services Agreement (“GSA”) with a term of no less than 5 years for electric service to transfer service for Store No. 32 from Rate 9 to the rates, terms and conditions of Rate 20. Answer at ¶3; Answer, Exhibit Nos. 3 and 4.⁴ As a courtesy to Parker, DESC agreed to retroactively apply Rate 20 to this account to September 2, 2010. Answer at ¶3.

Even though Parker chose to change Store No. 32 from Rate 9 to Rate 20 on or about September 20, 2010, it did not then make a similar request that its new Store No. 33 be placed on Rate 20 at that time. Instead, Parker waited approximately seven months before deciding to transfer its electric service for Store No. 33 from Rate 9 to Rate 20. On April 12, 2011, Parker executed a written agreement with a term of no less than 5 years for electric service and transferred service for Store No. 33 from Rate 9 to the rates, terms and conditions of Rate 20. Answer at ¶4; Answer,

⁴ As reflected in Answer, Exhibit No. 2, Parker executed an initial GSA for Store No. 32 on September 20, 2010. As reflected on Exhibit A, Attachment 1 to the Complaint and Answer, Exhibit No. 3, that GSA was later re-executed by Parker on November 3, 2010, because of an incorrect account number on the initial GSA. Nevertheless, DESC adhered to the original proposed effective date of September 2, 2010.

Exhibit No. 6. Again, as a courtesy to Parker, DESC agreed to retroactively apply Rate 20 to this account to March 21, 2011. Answer at ¶4.

Accordingly, no later than April 12, 2011, Parker had actual knowledge that 1) Rate 20 existed and was available to it; 2) unless Parker specifically requested service pursuant to Rate 20 or another rate schedule offered by the Company, DESC would initially provide service to its small and medium commercial customers under Rate 9; and 3) in order to receive electric service under Rate 20, it was required to execute a GSA for each separate service location. *See Southern Bread, LLC v. South Carolina Electric & Gas Company*, Order No. 2014-156, dated February 5, 2014, Docket No. 2013-435-E (“*Southern Bread*”) (granting motion for judgment on the pleadings and finding that complainant had actual notice of DESC’s Rate 20 when it executed a written agreement for electric service with the Company).

Parker then opened three new locations in South Carolina and applied for electric service at each location, with DESC providing service to the stores on or about the following dates:

- a. 6200 Jennifer Court, Bluffton South Carolina 29910 (“Store No. 43”) on October 25, 2013;
- b. 1705 Ribaut Road, Beaufort, South Carolina 29935 (“Store No. 48”) on May 30, 2014;
- c. 16319 Whyte Hardee Boulevard, Hardeeville, South Carolina 29927 (“Store No. 54”) on June 30, 2015;

See Answer at ¶5; Answer, Exhibit Nos. 7, 8, 9, and 12.⁵ The Complaint does not allege that Parker advised the Company of any specific electric service needs for these locations. In addition, Parker did not complete a formal application for service for Store No. 54; rather, Parker requested that DESC transfer service from the previous owner to Parker, effective as of June 30, 2015. *See*

⁵ Parker asserts that it “opened” Store Nos. 43, 48, and 54 on November 15, 2013, June 19, 2014, and December 4, 2015, respectively. Complaint, Exhibit A at p.1.

Answer, Exhibit No. 9 at p.1. As part of this request, Parker provided a copy of the previous owner's final bill, which plainly states the applicable rate for the previous customer—Rate 9. Parker therefore did not request service for Store No. 54 be provided under Rate 20, but requested that service, which then was being provided under Rate 9, be *transferred* to Parker. Thus, without any service history, without any specific request for certain service parameters, and with a request to transfer service for Store No. 54 which then was under Rate 9, Store Nos. 43, 48, and 54, initially received service under Rate 9.

Around the time Parker requested service for Store No. 54, a DESC account representative had several conversations with Ms. Patricia Sweat who had been identified by Parker as a Business Contact and Accounts Payable Contact for matters pertaining to Parker's electric service accounts and who Parker had identified as its corporate Secretary. *See* Answer at ¶28; Answer Exhibit Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 20; Answer, Exhibit No. 18 at ¶8, Attachment A. In the course of those conversations, the account manager advised Ms. Sweat that a review of Parker's rates should be conducted for the then-existing stores. Answer at ¶28; Answer, Exhibit No. 18 at ¶9, Attachment A; Answer, Exhibit No. 20. On or about August 11, 2015, the account representative conducted a "best rate" analysis for certain of Parker's then-existing locations, which showed that Store Nos. 43 and 48 were then served under Rate 9, and provided the information to Ms. Sweat. Answer, Exhibit No. 18 at ¶10, Attachment B. Although these documents showed that Store Nos. 43 and 48 would have reduced electric service charges under either Rate 20 or Rate 21; Ms. Sweat refused to make a decision regarding a change in the applicable rate schedules for these locations. Answer at ¶28; Answer, Exhibit No. 18 at ¶10, Attachment B; Answer, Exhibit No. 20.

In or around mid-September 2015, the account representative also hand delivered to Ms. Sweat at Parker's office in Savannah an account review package for Store No. 48, which included

a GSA form to transfer Store No. 48 from Rate 9 to Rate 21. Answer at ¶28; Answer, Exhibit No. 18 at ¶11, Attachment C. In addition, the account representative prepared two updated best rate analyses for Store No. 48 on August 31, 2015, and on September 10, 2015. Answer at ¶28; Answer, Exhibit No. 18 at ¶12, Attachment D. Although the Company does not have records specifically reflecting which of these analyses was provided, the account representative hand delivered at least one, if not both, of these documents to Ms. Sweat. These best rate analyses showed that Rate 21 would be the most appropriate rate for Store No. 48 in terms of the rates charged.⁶ The account representative requested that Ms. Sweat provide the information to the appropriate person at Parker's to make a decision about rates; however, DESC received no response to the information provided and received no further inquiries from Parker at that time. Answer at ¶28; Answer, Exhibit No. 18 at ¶¶12-13.

Subsequently, Parker's opened three additional stores in South Carolina and applied for electric service at each location, with DESC providing service to the stores on or about the following dates:

- a. 7021 N. Okatie Highway, Ridgeland, South Carolina 29936 ("Store No. 55") on February 19, 2016;⁷
- b. 12 Savannah Highway, Beaufort, South Carolina 29906 ("Store No. 58"), on June 30, 2016; and

⁶ The fact that the fees and charges for electric service rendered to Store No. 48 was less under Rate 21 than under Rate 20 further demonstrates that it is impossible for DESC to know whether a new location will have the same service requirements and characteristics as another location owned by the same individual or entity. In addition, one of the best rate analyses actually showed that, if Store No. 48 initially had been placed under Rate 20, as Parker claims it had "chosen," the service charges for this location actually could have been *more* than under Rate 9. For these reasons, it is the responsibility of the customer, not DESC, to either request a specific rate at the time service is established for a certain location or for the customer to specifically request the Company's assistance in analyzing whether another rate structure would be beneficial at a particular location.

⁷ DESC has not located the Application for Service for Store No. 55. The Company does not always require a written Application for Service for customers who have an existing account with DESC, which may explain the absence of a separate Application for Service for this location.

- c. 3462 Trask Parkway, Beaufort, South Carolina 29906 (“Store No. 59”), August 25, 2016.

Answer at ¶5; Answer, Exhibit Nos. 10, 11 and 12.⁸

At the time Parker applied for electric service to its stores, Parker acknowledged and agreed that the applications were “subject to the ‘General Terms and Conditions of [DESC] ... and that these ‘General Terms and Conditions’ [were] a part of [those] agreement[s].” Complaint, Exhibit A, Attachment 3 at p.1; Answer, Exhibit No. 7, 8, 10, and 11. Thus, Parker specifically agreed that “[i]t [was] the responsibility of Parker to select the Rate and [that] the Company will not assume responsibility for the choice.” Complaint, Exhibit A, Attachment 2 at p.4; Answer Exhibit No. 14. Moreover, Parker had actual knowledge of the existence of Rate 20 and that, in order to subscribe to electric service pursuant to this rate, it was required to execute a separate agreement for each location by virtue of the fact that Parker had executed two separate GSAs for Store Nos. 32 and 33. Answer, Exhibit Nos. 3, 4 and 6. In addition, prior to the time Parker applied for service at Store Nos. 55, 58, and 59, DESC had provided specific information to Parker that Store No. 48 then was on Rate 9 and that another rate (Rate 21) would result in reduced charges for electric service if Parker was willing to enter into a 5-year contract for this location. *See* Answer at ¶28; Answer, Exhibit 18, Attachment B. Again however, the Complaint does not allege that Parker advised DESC it desired to be served under Rate 20 or Rate 21 or that it advised the Company of any specific electric service needs for these locations.⁹ And, Parker had not responded to DESC’s communications regarding a rate review of Parker’s electric accounts or recommendations to transfer Store No. 48 to Rate 21. Thus, without any service history and without any specific request

⁸ Parker asserts it “opened” Store Nos. 55, 58, and 59 on March 14, 2016, July 21, 2016, and September 23, 2016, respectively. Complaint, Exhibit A at p.1.

⁹ As noted above, Parker requested that service Store No. 54, which previously received service under Rate 9, be *transferred* from the previous owner to Parker. Thus, Store No. 54 continued to receive service under Rate 9.

for certain service parameters for Store Nos. 43, 48, 54, 55, 58, and 59, these locations, like the initial service rendered to Store Nos. 32 and 33, initially received service under Rate 9.¹⁰

After these stores began receiving electric service, DESC issued monthly customer bills to Parker for each location and identifying the applicable fees and charges. Specifically, the initial bills for Store Nos. 43, 48, 54, 55, 58, and 59 were issued on or about the following dates:

- 1) Store No. 43 – November 5, 2013;
- 2) Store No. 48 – July 9, 2014;
- 3) Store No. 54 – August 3, 2015;
- 4) Store No. 55 – March 24, 2016;
- 5) Store No. 58 – July 14, 2016;
- 6) Store No. 59 – September 13, 2016.

See Answer, Exhibit No. 12. In accordance with S.C. Code Ann. Regs. 103-339(2), each of these monthly customer bills, which Parker acknowledges were received by its accounting department, *see Complaint, Exhibit A at p. 4*, identified “[t]he applicable rate schedule or identification of the applicable rate schedule”¹¹ for each location, which was Rate 9. *See Answer, Exhibit No. 12.* Contrary to Parker’s assertions otherwise, Parker therefore had actual notice and irrefutable knowledge that these locations were being billed under Rate 9 as of the dates of these initial bills.

Following the initiation of service, Parker continued to receive electric service at Store Nos. 43, 48, 54, 55, 58, and 59 pursuant to the terms and conditions of Rate 9 until July 2017. *Answer at ¶14.* At that time and thereafter, Parker executed written contracts requesting to transfer

¹⁰ Parker alleges that DESC “changed the rates” from Rate 20 to Rate 9 “without express authorization by Parker’s and without notification or warning by [DESC].” *Complaint, Exhibit A at pp. 2, 5.* To the contrary and just as was the case with Stores 32 and 33, each of Parker’s other six stores received service under Rate 9 from the time service began because these stores did not have 12 months of usage history under Parker’s ownership that would have allowed an analysis of the effect of the different rates and Parker did not request that these stores be served under Rate 20. DESC therefore did not “change” the rates for these stores from Rate 20 to Rate 9 as alleged and it was only after Parker requested and executed GSAs for these stores that DESC converted Parker’s accounts to Rate 20.

¹¹ One of the purposes of the Commission requirement that electric utilities include the applicable rate schedule on bills is so that the customer can confirm that the bill is being calculated based on the correct rate and prevent a situation where a customer can claim that it was unknowingly being billed incorrectly. *See Answer, Exhibit No. 20 at p. 4.*

electric service for Store Nos. 43, 54, 55, 58, and 59 from Rate 9 to Rate 20 and Store No. 48 from Rate 9 to Rate 21. *See* Answer, Exhibit No. 17. The Company since has supplied these stores with electric service pursuant to the terms, rates, and conditions of Rates 20 and 21.

ARGUMENT

The Complaint should be dismissed. Based upon the plain language of the Complaint, Parker has not alleged facts sufficient to constitute a cause of action that the Company failed to comply with any regulatory, statutory, or other legal requirements, or any Commission rule, regulation, or order. *See* Answer, Exhibit No. 21 at p.2 (“ORS found no areas of non-compliance with the PSC’s Rules and Regulations or the Company’s PSC approved General Terms and Conditions as they pertain to this matter.”). Because Parker cannot prevail on any legal theory and is not entitled to any relief, the Commission therefore should dismiss the Complaint.

Furthermore, and although DESC disputes and denies the claims set forth in Parker’s Complaint, the cause of action alleged by Parker accrued no later than the time it received its initial bills for service at Store Nos. 43, 48, 54, 55, 58, and 59. As mentioned above, each of these bills indicated these locations then were being served under Rate 9. In addition, Parker then had actual and constructive notice of the availability of Rate 20 as an option to meet its needs for electric service, by virtue of the fact that it had executed, on two prior occasions, GSAs for Store Nos. 32 and 33 to receive electric service under Rate 20 and had received numerous rate summaries provided by DESC after each account was established and annually thereafter. Parker also had actual knowledge that the total rates charged for Store Nos. 43 and 48 would be reduced under other rate schedules—Rate 20 and Rate 21, respectively—no later than mid-September 2015, but failed to respond to DESC’s recommendation that it change service for these locations.

Nevertheless, Parker did not file the instant Complaint until March 28, 2019. This was:

- 1) almost five and five months after Parker had actual notice that Store No. 43 initially received service under Rate 9;
- 2) almost four years and nine months after Parker had actual notice that Store No. 48 initially received service under Rate 9;
- 3) almost three years and eight months after Parker had actual notice that Store No. 54 initially received service under Rate 9;
- 4) over three years after Parker had actual notice that Store No. 55 initially received service under Rate 9;
- 5) over two years and eight months after Parker had actual notice that Store No. 58 initially received service under Rate 9; and
- 6) over two years and six months after Parker had actual notice that Store No. 59 initially received service under Rate 9.

See Answer, Exhibit No. 12.

In addition, on or about August 21, 2017, Parker filed an informal complaint with the South Carolina Office of Regulatory Staff (“ORS”), in which it sought the same relief as it currently is seeking in the above-captioned proceeding. See Answer, Exhibit No. 21 at p.1. After investigating Parker’s informal complaint, ORS concluded on October 5, 2017, that there were “no areas of non-compliance with the PSC’s Rules and Regulations or the Company’s approved General Terms and Conditions as they pertain to this matter.” *Id.* at p.2. Nevertheless, Parker waited another one and a half years before filing the instant Complaint with the Commission.

Parker’s claims, therefore, are time-barred pursuant to the statute of limitations set forth in S.C. Code Ann. § 58-27-960 as well as the doctrine of laches. See *Southern Bread*, Order No. 2014-156 (granting motion for judgment on the pleadings and dismissing complaint on the basis that complainant had actual notice of the existence of DESC’s Rate 20 but failed to bring the complaint within two years as required by S.C. Code Ann. § 58-27-960). Assuming, without conceding, that the 2-year statute of limitations set forth in S.C. Code Ann. § 58-27-960 does not

apply to this action, any causes of action related to Store Nos. 43, 48, 54, and 55 also are time barred by the 3-year statute of limitations set forth in S.C. Code Ann. § 15-3-530.

A. Legal Standard

A complaint must be dismissed if it fails to allege facts to support a claim upon which relief can be granted. Rule 12(b)(6), SCRPC. A defendant may move for dismissal when the plaintiff does not allege facts sufficient to constitute a cause of action. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). If the plaintiff is not entitled to relief, then it is proper to dismiss the case. *Spence v. Spence*, 368 S.C. 106, 122, 628 S.E.2d 869, 877 (2006). The Court must grant the motion if “the facts alleged [in a complaint] and inferences reasonably deduced therefrom, viewed in the light most favorable to the plaintiff” fail to “entitle the plaintiff to relief on any theory.” *Carolina Park Associates, LLC v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012) (quoting *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007)) (internal quotations omitted); see also *Chewning v. Ford Motor Co.*, 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001).

Rule 12(c), SCRPC also provides that “[a]fter the pleadings are closed...any party may move for judgment on the pleadings.” When considering such motion, the court must regard all properly pleaded factual allegations as admitted. *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991). “A judgment on the pleadings shall be granted ‘where there is no issue of fact raised by the complaint that would entitle the plaintiff to judgment if resolved in plaintiff’s favor.’” *Home Builders Ass’n of S. Carolina v. Sch. Dist. No. 2 of Dorchester Cnty.*, 405 S.C. 458, 460, 748 S.E.2d 230, 231 (2013) quoting *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009). Further, statutes of limitations and laches defenses are properly considered in the context of motions to dismiss and for judgment on the pleadings. See *Spell v. S.C. Dep’t of Highways & Pub.*

Trans., 292 S.C. 228, 355 S.E.2d 860 (1987) (affirming dismissal of action under Rule 12(b)(6), SCRCF for failure to bring suit within applicable statute of limitations); *Johnson v. Phifer*, 309 S.C. 505, 424 S.E.2d 532 (Ct. App. 1992) (affirming grant of judgment on the pleadings based upon statute of limitations); *U.S. v. City of Loveland, Ohio*, 621 F.3d 465, 474 (6th Cir. 2010) (affirming grant of judgment on the pleadings where it was undisputed that party had constructive notice of an issue but waited five years to bring its claim).

B. Failure to State Facts Sufficient to Constitute a Basis for Relief

The Commission's jurisdiction is limited to the adjudication of any claimed act or omission for an electric utility "of any law which the commission has jurisdiction to administer or of any order or rule of the commission." S.C. Code Ann. § 58-27-1940. However, Parker's Complaint fails to sufficiently identify, allege, or complaint of any act or omission under any applicable statute or regulation administered by the Commission. As Parker's Complaint fails to state a claim upon which relief can be granted and because Parker cannot prevail on any legal theory, there is no basis for relief under pertinent law and, therefore, the Complaint should be dismissed.

The basis of Parker's complaint is that DESC allegedly "overcharged" Parker for electric service rendered to Store Nos. 43, 48, 54, 55, 58, and 59 in that these locations initially received service under Rate 9 instead of its "chosen" rate of Rate 20. However, Parker has made no showing that it requested service under Rate 20 when applying for electric service for these locations or that it advised the Company of any specific electric service needs for these stores. Parker instead makes the baseless suggestion that the Company had an obligation to place these stores on Rate 20 simply because it had two other stores that received service under this rate schedule.

As an initial matter, DESC had no way of knowing what the electric usage and service requirements would be for these locations or that these locations would "share a very similar

electrical demand to” Parker’s other two stores.¹² DESC also did not know whether Parker then would be willing to abide by the terms and conditions of Rate 20 for a period of no less than 5 years for each of these locations. *See, e.g.*, Answer, Exhibit No. 13 (Parker requesting service under Rate 9 for certain new locations so that they “can get a feel for the load there” and because they “are not familiar enough with these sites.”). Notwithstanding these clear facts, however, there simply are no Commission regulations or other electric utility requirements that require DESC to automatically provide service to one location under the same rate schedule that is applicable to another location owned by the same customer. To the contrary, DESC’s Commission-approved General Terms and Conditions, which Parker agreed to accept when applying for service to these locations, makes clear that Parker—not DESC—was responsible for selecting the applicable rate schedule for electric service rendered to Store Nos. 43, 48, 54, 55, 58, and 59. Complaint, Exhibit A, Attachment 2 at p.4; Answer, Exhibit 14 at p.1. For this reason, the Company is not responsible for the customer’s choice of rate schedules for electric service. *Id.*

Through its Complaint, Parker also acknowledges receiving monthly bills for service supplied to these locations, which bills set forth the applicable rate schedule in effect for the stores at issue. *See* S.C. Code Ann. Regs. 103-339(2)(d). Parker therefore was on notice each month after service began that these locations were receiving service under Rate 9. Parker also had actual and constructive knowledge that Rate 20 existed and was available for its other stores by virtue of the fact that it had previously applied and contracted for service under Rate 20 for two other locations and that it had received multiple summaries of DESC’s available rates, including Rate 20.

¹² Notably, Store No. 48 does not share “very similar electrical demand” to that of Parker’s other stores, which is why Parker elected to receive service for this location under Rate 21 instead of Rate 20. *See* Answer, Exhibit No. 17.

Complaint, Exhibit A at p. 1; Answer, Exhibit No. 22. Nevertheless, Parker failed to make any request of the Company to alter its service until June 2017.

At bottom, Parker is dissatisfied that it failed to give even ordinary attention to its electric service accounts and, instead, is attempting to shift its imprudent business oversight onto DESC. Even so, the Complaint alleges no facts that suggests DESC failed to abide by its legal obligations and duties or comply with any Commission regulations or orders. Parker's Complaint therefore should be dismissed as its requested relief is neither warranted by the facts alleged nor permissible under governing law. *See* Answer, Exhibit No. 21 at p.2 ("ORS found no areas of non-compliance with the PSC's Rules and Regulations or the Company's PSC approved General Terms and Conditions as they pertain to this matter.").

C. Statute of Limitations for Reparation Orders

Parker alleges that it was incorrectly assigned to Rate 9 for its Store Nos. 43, 48, 54, 55, 58, and 59 and that, pursuant to S.C. Code Ann. Reg. 103-340(2),¹³ it is entitled to a refund for the difference between the amount it was actually billed and the amount it would have been billed under Rate 20.¹⁴ Pursuant to S.C. Code Ann. § 58-27-960, "[a]ll petitions concerning unreasonable, excessive, or discriminatory charges on which reparation orders may be made must be filed with the commission and provided to the Office of Regulatory Staff within two years from

¹³ S.C. Code Ann. Reg. 103-340(2) provides that "[i]f the electrical utility has willfully overcharged any customer, ... then the method of adjustment shall be as provided in the S. C. Code Ann. § 58-27-960."

¹⁴ Parker requests that "[DESC] be ordered to refund Parker's the overpayments it made as a result of being put on Rate 9, rather than its **chosen** and **best** rate of Rate 20, for Stores 43, 48, 54, 55, 58, and 59...." Complaint, Exhibit B (emphasis added). As stated above, however, the "chosen" and "best" rate for Store No. 48 (in terms of the rates charged) is not Rate 20 but Rate 21—the rate schedule Parker selected when it executed a GSA for this location on July 12, 2017. This further demonstrates the erroneous nature of Parker's Complaint—it wants a refund based on a rate it suggests DESC should have known would have been the "chosen" and "best" rate, even though the most economical rate schedule for Store No. 48 turned out to be a different rate (Rate 21) after DESC conducted an analysis of the historical consumption at this location, which historical data would not have been available at the time service was initially established.

the time the cause of action accrues” Based upon this applicable statute of limitations and Parker’s delay in pursuing this action for well over 2 years after it received notice that each of these locations was being charged for electric service under Rate 9, the Complaint is untimely and should be dismissed. *See Southern Bread*, Order No. 2014-156 (granting motion for judgment on the pleadings based on the statute of limitations provided by S.C. Code Ann. § 58-27-960).

In this case, the applicable statute of limitations began to run, at the latest, on the dates Parker received the initial bills for service at Store Nos. 43, 48, 54, 55, 58, and 59. *See Answer*, Exhibit No. 11. Assuming, *arguendo*, the allegations set forth in the Complaint, Parker had direct notice and actual knowledge that these stores initially were placed on Rate 9 on these dates and had actual notice of the existence of Rate 20. Parker therefore was on notice that a claim against DESC might exist between more than two years and five months and more than five years and four months ago. Thus, the applicable statute of limitations for Parker’s claims expired at least on:

- 1) November 22, 2015 for Store No. 43;
- 2) July 29, 2016 for Store No. 48;
- 3) August 21, 2017 for Store No. 54;
- 4) April 11, 2018 for Store No. 55;
- 5) August 4, 2018 for Store No. 58; and
- 6) October 3, 2018 for Store No. 59.

“A cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises.” *Walter J. Klein Co. v. Kneece*, 239 S.C. 478, 484, 123 S.E.2d 870, 874 (1962) (holding that the lower court erred failing to grant a motion for judgment on the pleadings on the ground that the action was barred by the statute of limitations). “Under the discovery rule, the statute of limitations begins to run from the date the claimant knew or should have known that, by the exercise of reasonable diligence, a cause of action exists.” *Holmes v. Nat’l Serv. Indus., Inc.*, 395 S.C. 305, 309, 717 S.E.2d 751, 753 (2011). Further:

The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party **might** exist. **The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.**

Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (emphasis in original). *See also Maher v. Tietex Corp.*, 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998) (“South Carolina’s statute of limitations requires ‘very little to start the clock.’”) *quoting Roe v. Doe*, 28 F.3d 404, 407 (4th Cir.1994) (applying South Carolina law); *Tanyel v. Osborne*, 312 S.C. 473, 475, 441 S.E.2d 329, 330 (Ct.App.1994) (“The law charges a plaintiff with discovery when the facts and circumstances of his injury would put a person of common knowledge and experience on notice that some claim might exist against the defendant.”). Statutes of limitations also “are designed to promote justice by forcing parties to pursue a case in a timely manner. Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs.” *State ex rel. Condon v. City of Columbia*, 339 S.C. 8, 19, 528 S.E.2d 408, 413-14 (2000). *See also Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct.App.1996) (“One purpose of a statute of limitations is ‘to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights.’”) *quoting McKinney v. CSX Transp., Inc.*, 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct.App.1989)); *id.*, 322 S.C. at 176, 470 S.E.2d at 404 (“Another purpose of the statute of limitations is to protect potential defendants from protracted fear of litigation.”).

Parker’s insinuation that it is meaningless these bills were “merely received by the accounting department so that [they could] be paid” cannot overcome the statutorily mandated limitations of S.C. Code Ann. § 58-27-960. In Exhibit A to the Complaint, Parker states that

“[DESC’s] claim that Parker’s should have known that it was on the wrong rate relies on only two things. One of which is the monthly bill that is merely received by the accounting department so that it can be paid.” Parker’s suggestion that somehow Parker has no responsibility to review its own bills and the propriety of the rates charged therein they are paid by the accounting department is nonsensical. Even so, Answer, Exhibit No. 12 reflects that the initial bills were not directed or addressed to Parker’s “accounting department.” Rather, each initial bill was addressed to “Gregory M. Parker, Inc.” at the billing address designated by Parker in the various applications. *See* Answer, Exhibit No. 12. Simply because Parker failed to implement internal policies and procedures to review its utility bills prior to routing them to its accounting department for payment or, perhaps more logically, to require its own accounting department to review the bills for any perceived errors prior to payment, does not overcome the fact that Parker had actual notice these locations were on Rate 9. Nor does Parker’s corporate decision to forward its utility bills to its accounting department for payment without verifying the rates charged therein amount to any liability on behalf of DESC.

However, these bills, which were issued between more than two years and five months and more than five years and four months prior to filing the Complaint, *see* discussion *supra* pp. 13-14, provided Parker with actual notice and irrefutable knowledge that these locations then were being billed under Rate 9. Moreover, on each of these dates, Parker had actual knowledge of the availability of Rate 20 by virtue of the fact that two of its stores were receiving electric service pursuant to Rate 20 and had executed two separate GSAs to this effect. Parker also had constructive knowledge of the availability of Rate 20 through DESC’s provision of the Summary of Non-

Residential Rates to Parker every year since it initially began receiving service at its first location in South Carolina—Store No. 32.¹⁵

Furthermore, Parker’s claim that “[DESC] cannot show that [the documents attached to the Answer as Exhibit 18, Attachments B, C, and D were] actually delivered to the appropriate people at Parker’s” is both unavailing and wrong. As reflected in his Affidavit, Henry Parks Moss III has affirmed that he provided Attachments B and C to his Affidavit and at least one of the documents in Attachment D to his Affidavit directly to Ms. Sweat. Answer, Exhibit No. 18 at ¶¶9-11. Therefore, no later than August 2015, Parker had actual notice and irrefutable knowledge that Store Nos. 43 and 48 were not then receiving service under Rate 9 and that they would benefit from a reduced rate by transferring this location to either Rate 20 or 21. Despite receiving this notice and acquiring this actual knowledge, Parker’s instead did nothing for almost two years, and now seeks a windfall at DESC’s expense and despite its dilatory practices.

In sum, Parker’s claims are without merit and are contravened by both their repeated receipt of notice and actual knowledge that these locations were on Rate 9. Even so, by waiting to file its Complaint until March 28, 2019—well after two-years from the time it had notice of these alleged claims—Parker unreasonably delayed in asserting these claims and the statute of limitations set forth in § 58-27-960 bars the relief now sought. *See Southern Bread*, Order No. 2014-156.

¹⁵ In accordance with DESC’s internal policies, the Summary of Non-Residential Rates is provided by inserting a copy of the Summary in each customer’s bill. Although Parker is a single entity which owns and operates eight different stores in South Carolina, DESC issues separate bills for each location. As a result, Parker would have received multiple Summaries every year, one for each of its stores.

D. Statute of Limitations for Actions Upon a Contract, Obligation, or Liability, Express or Implied, and for any injury to the Person or Rights of Another.

Alternatively, and without conceding the applicability of the two-year statute of limitations set forth in § 58-27-960, any claims for alleged overcharges for Store Nos. 43, 48, 54, and 55 also are barred by the 3-year statute of limitations set forth in S.C. Code Ann. § 15-3-530.¹⁶ *See Santee Portland Cement Co.*, 299 S.C. at 271, 384 S.E.2d at 694 (holding the discovery rule applies to breach of contract actions). Section 15-3-530(1) provides that “an action upon a contract, obligation, or liability, express or implied” must be commenced within three years. Section 15-3-530 (5) also provides for a three-year statute of limitations for “an action for ... injury to the person or rights of another, not arising on contract and not enumerated by law.” Parker’s claims for Store Nos. 43, 48, and 54 therefore are barred by § 15-3-530 as this action was not instituted within three years of discovery of the alleged breach.

E. Laches

Similarly, Parker’s Complaint is barred by the doctrine of laches.¹⁷ “Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights.” *Chambers of S.C., Inc. v. County Council for Lee County*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). “In other words, laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” *Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 587-88, 735 S.E.2d 528, 539 (Ct. App. 2012). “The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the

¹⁶ For the sake of brevity, DESC incorporates herein the above-discussion. Sections A, B, and C, *supra*.

¹⁷ For the sake of brevity, DESC incorporates herein the above-discussion. Sections A, B, and C, *supra*.

circumstances, and (3) prejudice.” *Robinson v. Estate of Harris*, 388 S.C. 630, 642, 698 S.E.2d 222, 228 (2010).

On its face, Parker’s Complaint demonstrates an unreasonable and unexplainable delay in bringing this action. Parker admits that Store No. 32 was placed on Rate 20, which occurred as a result of Parker’s execution of a GSA on September 20, 2010. Complaint, Exhibit A at p. 1; Answer, Exhibit No. 2. Parker also admits that Store No. 33 was placed on Rate 20, which occurred as a result of Parker’s execution of a GSA on April 12, 2011. Complaint, Exhibit A at p. 1; Answer, Exhibit No. 5. Parker further acknowledges that the bills issued by DESC for Store Nos. 43, 48, 54, 55, 58, and 59, which provided clear notice that these locations were being charged under Rate 9, were received and processed by its accounting department. Complaint, Exhibit A at p. 4; Answer, Exhibit No. 12. Despite the fact that 1) it had actual knowledge of Rate 20, 2) it had actual knowledge it was required to execute a separate GSA for each location desiring to receive service under Rate 20, and 3) it received actual notice that Store Nos. 43, 48, 54, 55, 58, and 59 were receiving service under Rate 9, Parker failed to contest the continued supply of electric service by DESC under Rate 9 until approximately five and a half years after it received the first bill for service for Store No. 43, which clearly stated this location was receiving service under Rate 9. Parker also waited over three and a half years after receiving documents from an DESC account representative that Store Nos. 43 and 48 would experience reduced rates under either Rate 20 or Rate 21. Parker further delayed for almost one and a half years in prosecuting this matter at the Commission after having its informal complaint denied by ORS on October 5, 2017. *See* Answer, Exhibit No. 21. Parker’s negligence in these regards therefore reflects a lack of diligence, which is properly considered in determining whether a complaint may be barred by laches. *See Presbyterian Church of James Island v. Pendarvis*, 227 S.C. 50, 86 S.E.2d 740 (1955) (holding a

party seeking to enforce a trust “may become barred by laches if he fails to proceed with reasonable diligence”).

Moreover, Parker’s delay was unreasonable. As explained above, Parker had actual knowledge that each of the stores at issue were being charged pursuant to Rate 9 by virtue of the initial bills issued for these locations dating back to November 5, 2013. As well, Parker had actual knowledge of the existence of Rate 20 no later than April 12, 2011, when it executed a GSA for Store No. 33. Moreover, the Complainant received constructive notice of DESC’s alternative available rates every year through DESC’s annual provision of its Summary of Non-Residential Rates. Instead of changing to Rate 20, Parker continued to receive electric service under Rate 9 at Store Nos. 43, 54, 55, 58, and 59 until it executed a GSA for these locations in July 2017.

Finally, DESC is prejudiced by Parker’s delay in seeking the relief it now alleges is due. In serving Parker under Rate 9, DESC stood ready to meet Parker’s electric service needs without regard to any limitations on its minimum demands and without requiring a 5-year written commitment for electric service. Additionally, had Parker requested to transfer electric service for Store Nos. 43, 54, 55, 58, and 59 to Rate 20, DESC would have converted the stores to this rate¹⁸ and reduced the amount collected. Since the time Store No. 43 initially began receiving service, DESC has advanced at least six fuel adjustment proceedings, several rate adjustments under the Base Load Review Act, and other similar regulatory matters that pertain to electric service rates. Each of these actions adjusted the Company’s rates and charges based, in part, upon its level of electric service to its residential, commercial, and industrial revenue collections. As a result, should Parker prevail on its claims, which DESC denies, the Company will have lost the opportunity to set rates based upon diminished revenues. In addition to this economic prejudice, there is also

¹⁸ Assuming these stores were eligible for Rate 20 at the time of the request.

evidentiary prejudice to DESC (such as lost or stale evidence and witnesses whose memories have faded), which is inherent in cases involving a delay of over five years. In short, Parker's unconscionable delay, coupled with undisputed severe prejudice to DESC, warrants the application of the doctrine of laches to bar Parker's case in its entirety.

F. Limitation of Claims

Alternatively, the Commission should limit Parker's claims to those allegedly arising no more than two-years prior to filing this action. Parker asserts that DESC put Store Nos. 43, 48, 54, 55, 58, and 59 "on Rate 9 without notice, warning or explanation" and that placing these locations on Rate 9 was done "without authority, direction or knowledge by Parker's." Complaint at pp. 2, 3. As set forth in the Complainant, these stores initiated electric service with DESC from 2014 through 2016; therefore, the initiation of service to each store occurred more than two-years prior to Parker's filing of the Complaint on March 28, 2019. Therefore, any claims relating back to the initiation of electric service to Parker's stores are barred by the statute of limitations set forth in § 58-27-960 and Parker should not be permitted to advance any claims arising on or before March 28, 2017, or for the recovery of any allegedly excessive rates paid prior to this date.

CONCLUSION

WHEREFORE, having set forth its motion, the Company requests that the Commission dismiss the above-captioned complaint with prejudice. DESC also moves that the Commission hold the above-captioned matter in abeyance, including testimony filing dates set forth in the Commission's Prefiled Testimony Letter dated April 9, 2019, and other similar deadlines, in abeyance until such time as the Commission may consider and resolve this matter. DESC further requests that the Commission grant such other and further relief as is just and proper.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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April 29, 2019

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